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In re Application of :
OGILVY, Ian Charles :
Application No.: 10/585,072 :
PCT No.: PCT/AU99/00952 : DECISION ON PETITION
Int. Filing Date: 02 November 1999 : UNDER 37 CFR 1.137(a)
Priority Date: None :
Docket No.: CRD-0009 :
For: IMPROVED COMPUTING SYSTEM AND
COMPUTING DEVICE

This decision is issued in response to applicant's "Petition to Revive the Application under 37 CFR §1.137" filed 14 May 2007, which is being treated as a Petition for Revival of an Application for Patent Abandoned Unavoidably under 37 CFR 1.137(a).

BACKGROUND

On 02 November 1999, applicant filed international application PCT/AU99/00952 which claimed no priority date. A copy of the international application was communicated to the United States Patent and Trademark Office from the International Bureau on 11 May 2000. Pursuant to 37 CFR 1.495, the deadline for payment of the basic national fee in the United States was to expire 30 months from the priority date, 02 May 2001.

On 29 June 2006, applicant filed a transmittal letter for entry into the national stage in the United States which was accompanied by, inter alia: the \$150 basic national fee, a copy of the international application; a petition to revive under 37 CFR 1.137(b). In a decision dated 28 July 2006, applicant's petition to revive under 37 CFR 1.137(b) was granted.

On 06 September 2006, the United States Designated/Elected Office (DO/EO/US) mailed a Notification of Missing Requirements under 35 U.S.C. 371 (Form PCT/DO/EO/905) indicating declaration in compliance with 37 CFR 1.497(a) and (b) was required. Furthermore, the Notification indicated that an additional claim fee of \$1780 was due.

On 14 May 2007, applicant filed a "Petition to Revive the Application under 37 CFR §1.137."

DISCUSSION

A grantable petition pursuant to 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the requisite petition fee; (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) any terminal disclaimer required pursuant to 37 CFR 1.137(c). Applicant has satisfied items (2) and (4) have been satisfied.

Regarding item (1), the required reply was the submission of a declaration in compliance with 37 CFR 1.497, payment of the surcharge for delayed filing of the declaration, and payment of additional fees based on the number of claims presented. Petitioner has not submitted the items listed above. Further, petitioner states that inventor Ian Charles Ogilvy is unavailable to execute the declaration. Therefore, in order to comply with the proper reply requirement of item (1) above for revival under 37 CFR 1.137(a), applicant must submit a grantable petition under 37 CFR 1.47(b). Accordingly, item (1) has not been satisfied.

Regarding item (3), applicant has not met the burden of proof to show that the abandonment was unavoidable. One of the requirements for a grantable petition under 37 CFR 1.137(a) is an adequate showing that the entire delay in filing the required reply was unavoidable. Section 711.03(c)(2), of the Manual of Patent Examining Procedure ("MPEP") states the following:

Decisions on reviving abandoned applications on the basis of 'unavoidable' delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business . . .

Here, applicant states that failure to submit the required reply was unavoidable due to the inability to locate inventor, Ian Charles Ogilvy. However, the actions taken in the prosecution of this case do not reflect unavoidable delay. Specifically, unavoidable delay is present only where petitioner and those acting for petitioner take all actions necessary to continue the prosecution of an application, but through the intervention of unforeseen circumstances, a required action is not timely taken. The actions and circumstances described in this petition, however, do not reflect the "care or diligence that is generally used and observed by prudent and careful men in relation to their most important business." Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

A petition to revive an application under 37 CFR 1.137(a) cannot be granted where a petitioner has failed to meet his burden of establishing unavoidable delay within the meaning of 37 CFR 1.137(a) and 35 U.S.C. 133. Haines v. Quigg, 673 F. Supp. 314, 5

USPQ2d 1130 (N.D. Ind. 1987). Therefore, since applicant has not satisfied item (3) above, the granting of the petition under 37 CFR 1.137(a) for revival based on unavoidable delay would not be proper.

Therefore, in view of the above facts the abandonment cannot be held at this time to be unavoidable.

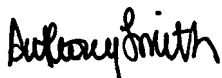
CONCLUSION

For the reasons above, the petition under 37 CFR 1.137(a) is **DISMISSED** without prejudice.

If reconsideration on the merits of this petition is desired, an appropriate response to this decision must be filed within **TWO (2) MONTHS** from the mail date of this decision. Any reconsideration request should include a cover letter entitled "Renewed Petition Under 37 CFR 1.137 (a)." Extensions of time may be obtained under 37 CFR 1.136(a).

Any further correspondence with respect to this matter deposited with the United States Postal Service should be addressed to the Mail Stop PCT, Commissioner for Patents, Office of PCT Legal Administration, P.O. Box 1450, Alexandria, Virginia 22313-1450, with the contents of the letter marked to the attention of the Office of PCT Legal Administration.

The file does not indicate a change of correspondence has been submitted, although the address given on the petition differs from the address of record. If appropriate, a change of address should be filed in accordance with MPEP 601.03. A courtesy copy of this decision is being mailed to the address given on the petition; however, the Office will mail all future correspondence solely to the address of record.



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